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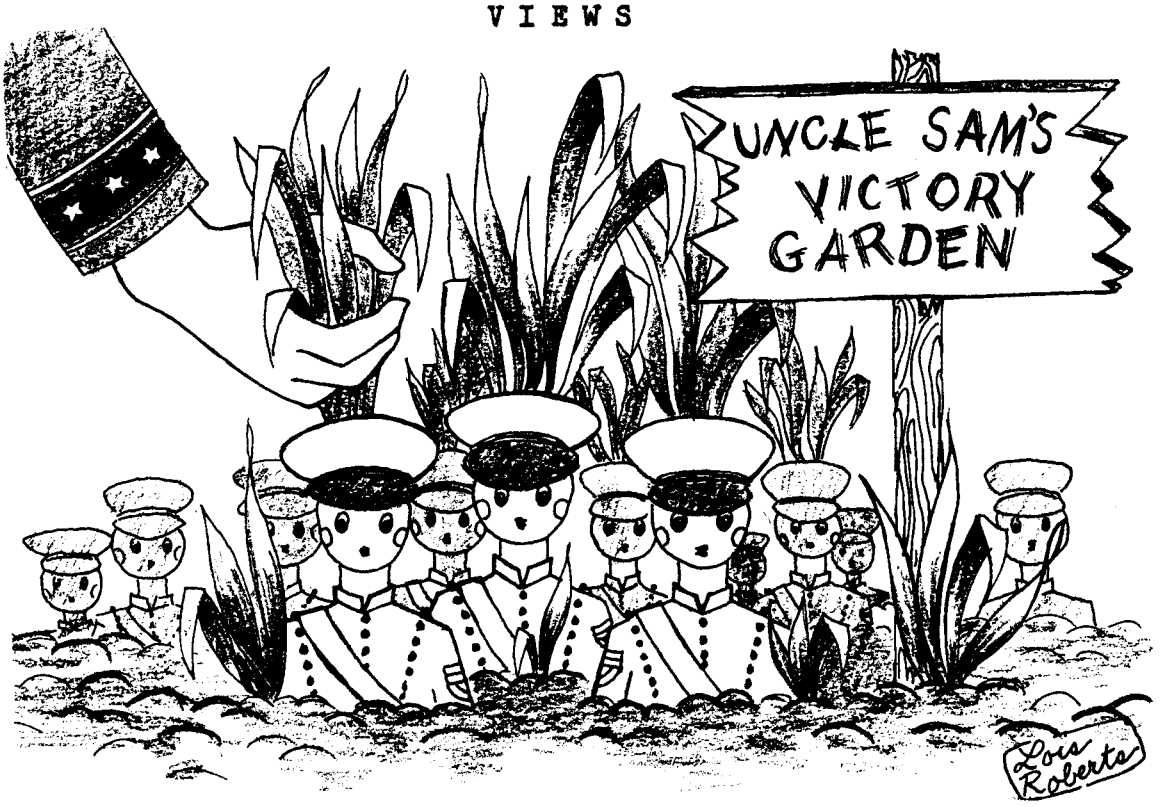

THE DRAFT

PART I -- POSSE COMITATUS

There was a time in Europe when most individuals were, in effect, classed with fruit trees and grapevines and vegetables--they were in law attached to the land. What amounted to ownership of them went with the land, should it be conquered, or sold, or given away, or inherited. The most important fact about the serf was

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the land in which he was rooted. In case of war with a neighboring baron a few miles away, or a princeling a hundred miles away, or a Mohammedan Sultan a thousand miles away, his person could be (and was) required to attend his liege lord, to carry a spear, to care for armor, to prepare supplies, or to do whatever was necessary to make war according to the fashion of the time. Always he suffered, often he died, and it was not recognized that he was anything more than a walking, talking, rather useful plant.

Were you to ask any liege lord, "Is this fair?" most would not even have understood the question. An especially thoughtful one of them might well have said that nothing is totally fair, but society must be served or it will not survive. Of course he would mean his society, that best of all possible worlds, feudal Europe.

One thing we must note--feudalism was consistent. Liege lords never made grand statements about the rights of man as they dragged off human battle fodder. If you're owned, then you are there to be used and disposed of.

Naturally all this has long passed. The rights of man are now recognized beyond argument--as part of this republic's basic legal assumptions. Man no longer exists for the land; rather, the land is there for man. Man is no longer considered a vegetable to be harvested for the purposes of his liege lord.

One thing has been established. Man is more than a plant. Or has it?

We live today with a contradiction whose seeds were laid down long ago, one might even say, in prehistory. But the direct lineage of this contradiction, now presently codified in the Selective Service Act, goes back to the last days of the Roman Empire and the institutions called patrocinium and precarium, and to a related idea held by the Germanic barbarians, that of the posse comitatus.

Rome ruled by law, even though the concept of rights had not yet been developed. The establishment of universal peace (the Pax Romana) coupled with a great deal of freedom of action, resulted in an empire of prosperity, of protection of citizens, and of commercial activity.

Rome did not die in a day--it ceased to be an effective governing force, first in one district, then in another, sometimes to reassert itself and then collapse again. Local lawfulness and justice disintegrated; individual citizens

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were subjected to more and more robbery and extortion; districts were pillaged by bandits or ravaged by quasi-legal local governments that came and went like shifts in the direction of the wind. In the end, no one had anyone but himself to look to for the protection of his person and property.

And so an old Roman relationship, that of patron and client (patrocinium) expanded and gained new meaning. Lacking protection from his government, the powerless individual escaped the consequences of anarchy by putting himself under the protection of a local strong man, a patron. It was, at first, a contractual relationship. Protection was granted for military, agricultural, clerical, domestic, or other services rendered.

As conditions worsened, the institution of precarium came on the scene. Here the small landowner, unable to protect himself, would swear over, not services, but ownership of his land to a nearby patron. In return he received protection and the use of the land that once was his, but only for his lifetime. His children were landless, and if they wished to use the land and to gain protection, they had to swear to provide services and produce for the patron.

When the tribal barbarians finally and permanently occupied the lands of previous Roman dominion in Western Europe, the foundations of what was to become feudalism were there in the institutions of patrocinium and precarium. Through these already existing institutions (and through the conditions that gave them sway), the fear-ridden, landless, de-individualized population was prepared to be absorbed into the collectivist traditions of the barbarians. In fact, these institutions fitted neatly into a concept of the barbarians signified in Latin by the phrase posse comitatus, meaning literally "the power of the community." This tradition was grounded in ceremonies of fealty which through vows and ceremonies subordinated the individual to the tribe. The key tenet was the obligation of each member of the tribe to make himself a part of the tribe's power; specifically, each member was at all times to answer his chieftain's call to arms.

In a few generations, man the citizen and landowner and free artisan became man the tribalized vegetable, part of that structure of fealties, privileges, and powers that froze Europe into near-immobility for centuries.

Some apologists for feudalism praise the era by saying that it was one of order, where each man "knew his place." I agree. But it was an order like that of the prison, each man in his cell--a cell his son and his son's sons would have

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to occupy into eternity, bound to the land, bound also to the performance of certain inescapable duties. Feudal Europe at its most orderly was not totally changeless. There were many shifting traditions, many exceptions; and eventually the inherent necessity for change that is in the nature of a social system led to its end. But one duty ran as a binding chain through all the variations of feudalism--the obligation of each vassal to serve on the battlefield. You owed your patron (now a feudal noble) that, or else you were not protected, nor could you have a living from your patron's lands, nor could you leave the land. Should you refuse, most likely you would die, perhaps hoisted in a cage near the castle entrance to starve in the sight of your fellow serfs. Patrocinium and precarium, blended into the guiding spirit of posse comitatus, had made you but a plant growing for tribes within tribes: the immediate manor, the barony, the duchy, the princedom and, over all, Christendom.

Eventually the tradition of posse comitatus, codified and verbalized, became part of post-feudal English law. In 1626 it was translated from the Latin as "the force of the county...the body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons) whom the sheriff may summon or raise to repress a riot or for other purposes." (The Oxford Universal Dictionary, Third Edition, Revised 1955.)

Thus do we have the long antecedents to that characteristic remark of the American Western, "Let's get a posse together and go after him."

It was from this same tradition that Great Britain derived Impressment, a system of draft applied primarily in the 1700's and early 1800's to fill out the crews of naval vessels. (It was abandoned in the mid-nineteenth century in favor of long-term volunteer enlistments and the development of naval service as a career.)

When Britain's North American colonies rebelled against the crown, after a long and fruitless attempt by colonial leaders to gain redress of grievances through petition and other legal means, they issued a document in which they explained themselves. In it they said, "that all men are...endowed...with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

There was no hue and cry of tyranny, of "abuses and usurpations," when in 1777 Massachusetts and Virginia instituted compulsory military service to pursue the values laid out in that document.

Posse comitatus was so assumed to entail the obligation of the citizen to the

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state (even to one which had come into being through rebellion) that George Washington in 1778 wrote to the President of the Continental Congress, "I believe our greatest and only aid will be derived from drafting, which I trust may be done by the United States."

I do not doubt Washington's sincere support of the political ideals in the Declaration of Independence. In the face of a tradition going back at least to the last days of the Roman Empire, he simply could not see an inconsistency between those ideals and a draft. Nor did his fellow revolutionaries. The idea of a political system based on rights which all men had from birth was a very new one. So Congress did recommend a draft to all the colonies. Supposedly only the fortuitous aid of the French made it unnecessary.

What the feudal tradition set was the precedent. In principle, this precedent went largely unchallenged by the thinkers of the Enlightenment. Worse, it was sanctioned by some of the most brilliant activists of that movement. A few men, off in what was then an obscure corner of the world, pledged "our Lives, our Fortunes and our sacred Honor" to secure the rights of man--and saw no contradiction in forcing men to fight for the tribe, as long as the tribe fought tyranny.

But feudal levies, impressment, colonial drafts are little things beside the all-encompassing grasp of modern conscription.

It was in a cataclysm that modern conscription came into being. And it was born in the name of liberté, fraternité, and égalité.

In 1789 the Ancien Régime of France crumbled. An old-fashioned absolutism was succeeded by one in a newer fashion, one that used mass ideology, mass arrests, mass murders, and mass armies.

The first experiment in conscription ended in disastrous failure. In 1789 the concept of égalité was held to mean equality in one's obligation to serve in the military with "every able-bodied man liable." The enforcement of such universality was impossible. By 1792 "able-bodied" men by the tens of thousands had deserted their homes. The district of Vendee rose in revolt almost to a man.

Clearly, the design had not yet been perfected. The first refinement was one of utmost simplicity: in effect, a majority ganged up on a minority. The law was changed. Liability for service was restricted to young men only, men between

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the ages of eighteen and twenty-five. This group simply was not strong enough politically to prevent coercion. Only one other refinement was needed to produce a workable design. It was noted that the nation suffered when too many skilled artisans were taken. So the institutions of deferment and exemption were incorporated. (The English had excused London fishing masters and others from Impressment many years earlier, on the grounds that they were of too great a service to the nation.)

The military instrument of modern dictatorship now ready, there arose the first modern dictator: the first to apply the modern principle derived from posse comitatus. He was, of course, Napoleon Bonaparte. It was he who said to Metternich that all he needed was 25,000 men a month. He got them. Eventually his total draftees numbered well over two million men. With them, he first conquered and then lost Europe, leaving the bodies of conscripts strewn across the continent from Madrid to Moscow.

Under Napoleon, France became a human breeding farm, which turned out a crop of up to 116,000 young men a month: the youth which made the campaigns of Napoleon possible.

He ended at Waterloo, but mass conscription did not. Prussia used it, as she welded the hodgepodge of German-speaking principalities of mid-Europe into an empire.

Napoleonic conscription came to the United States in World War I (where some even wanted to broaden it to include the conscription of workers for industry and agriculture). Essentially, this system is the law of the United States today.

And its purpose is the same as it was for Napoleon and for Bismarck--the pursuit of state-chosen ends, ends which are held to be higher than those chosen by individuals for themselves.

Mass conscription did not embody a contradiction in states which had accepted the idea of a dictator-emperor, whether set up by plebicite (France) or openly affirmed by a privileged nobility and military caste (Prussia).

But in the United States the contradiction is so open it is like a grand purloined letter on the table of history; open and apparent and obvious, and

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yet few have chosen to declare it so. This is the republic whose basic law and legal tradition emphasize the inviolability of rights: of life, liberty, and property. Nowhere in the Constitution is the explicit power given the government to conscript coercively. It takes an act of imagination to read this power as being implied by the power given Congress to raise armies. Further, it takes a mind-boggling act of reverse-think to see the right to bear arms as really the duty to be an arms bearer. No, quite clearly there is no objective, unequivocal foundation for the draft in the Constitution.

And yet in the American Revolution itself, in the Civil War (on both sides), and then massively and with Napoleonic scope in the wars of the twentieth century, this nation's government has violated rights in order to raise armies.

Suppose we put the principle behind American draft laws into words. In words, here it is in all its deceptive simplicity; here is our legacy from patrocinium and precarium and posse comitatus:

TO BE PERMANENTLY FREE, WE MUST TEMPORARILY ENSLAVE.

Is "enslave" too strong a word for a system that takes a man for a few years only, pays him at least something, and upon discharge gives him scholarships and guaranteed loans and special privileges? It is not, if we take the term literally. To enslave is to seize the person of someone and put his person and services under the control of another as owner or master. (Webster's New International Dictionary, Second Edition, Springfield, 1937.) It is in the nature of soldiering that, once inducted, the use and disposal of the soldier's person by his commanding officers is practically unlimited. The volunteer has agreed to this. The conscript has been ordered to agree. In the final analysis, when he goes to war he could not choose any other action. If he refuses to go, his liberty and property are indeed precarious.

It is strange to think that a tradition with its roots in the dissolution of an empire and in the tribal traditions of the hordes which supplanted it still operates among us, whether acknowledged in so many words or not.

It is the spirit behind posse comitatus that rules the destinies of our young men, calling them to serve our tribe just as the chieftains did over a millennium ago in the black forests and foggy plains of the barbarian lands outside the Roman Empire.

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Here it is, almost in so many words, in a quote from the Secretary of War of the United States in 1917:

"The bill makes certain the raising and maintenance of the required forces with the utmost expedition. It establishes the principle that all arms-bearing citizens owe the nation the duty of defending it. It selects only those who by reason of their age and physical capacity are best fitted to receive the training and withstand the actual hardship of campaigns and who, happily, can be taken with least disturbance of normal economic and industrial conditions."

So the principle of posse comitatus, which should have gone the way of serfdom and special privilege and levies, lives on, dressed in its more modern clothes. Conscription is but another form and application of tribal collectivism, but another application of the moral position that service to the values of the group are fundamentally prior to service to the values of oneself. In the present Selective Service Act, this principle is carried out to the last detail and with great consistency.

To see that this is so, take this test. First read the two following cases:

Case #1: A twenty-year-old man has made a down payment on a bulldozer. He has started a business--earth moving as a subcontractor. He sees no point in going to college; instead he is taking technical courses, both at night and from a correspondence school. He expects that in a few years his income will be over $10,000 a year, and then he will be able to marry. Beyond that, he sees the day when he'll own his own contracting firm, and he hopes (no, is certain) that one day he will build some of the biggest buildings in the country.

Case #2: A twenty-year-old man, in college, is uncertain of what he really wants to be. However, officially he's becoming an electrical engineer and will go for his doctorate in order to teach. Presently, he attends college on a state scholarship, his grades average in the high B's. Any higher, and, as he says, "There's no time for real living." He plans to marry in a few months, won't be a bit surprised if the first baby comes near the end of his senior year.

This test has only one question. Which young man will be drafted first? Do you need to refer to the Selective Service Act in order to answer?

The standard for exemption and deferment is the degree of actual or potential

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service to others. It is simply held to be obvious that doctoral candidates in engineering who want to teach are much much more valuable than entrepreneurial earth movers--and, anyway, there'll be that wife and baby when the time comes for the local board to reconsider Case #2. Not only does he serve the nation, but he has a family, too. The only way he could more certainly establish his draft-exempt status would be to become a student for the ministry, taking evening courses in medicine, with the eventual goal of becoming an overseas Peace Corps electronic medical missionary.

There is virtually no one reading this article who does not know one or more young man who has twisted his life into a counterfeit of his real purposes in order to conform to the official state morality and thus avoid the draft. Tens of thousands of young men take college courses they don't want, enter careers that are a torture to them, attend graduate schools that are a bore to them, marry women they love with a love most fortunate in its timing, and, with similar timing, have children. All of this, as supposedly free citizens in a free country where basic law says no man may have his freedom of speech abridged, his home invaded without warrant, his property taken without due process, his liberty taken away without formal charge and trail by jury. Young men, who are the supposed inheritors of all this, by the thousands seek to avoid the forced seizure of their persons by using fraud, deceit, evasion, connivance, conspiracy and self-deception.

And, in doing this, they often bring down upon themselves an incalculable burden of undeserved guilt.

It is time that our present institutions made a step or two beyond the semi-mystical, semi-tribal barbarities of prehistorical savagery. It is time; it has been for centuries. It is time simply to see that it is wrong to enslave, even if your goal is to preserve freedom.

But much of this has been said before. It may not have been said enough; it quite obviously has not convinced a sufficient number of people. The draft goes on, with virtually all of those screaming in the streets protesting, not the principle of conscription, but the fact of war. Or rather, only the latest war that conscription has made possible.

Once before this country tried to make a contradiction in principle work. It didn't. Ultimately two million men died. The republic itself nearly bled to death; today it still bleeds. That contradiction was the simultaneous recognition both of rights and of the institution of slavery. How we have paid and

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are paying for those few words in the Constitution!

Are the consequences potentially as grave if the nation persists with this other peculiar institution, conscription? At first glance, have results been so terrible?

The U. S. has been victorious in two major wars and in a lesser war, all in the last fifty years. Still using conscription, it bodes well to win this latest of its lesser wars. All it has cost has been several hundred thousand men, and many of these were volunteers.

Can't we just continue to evade the fact of injustice? After all, statistically, only a few are affected. They can't do much politically; the French administrators made that discovery some time ago. So the republic will go on.

Or will it?

That is a question which will be examined in a future installment.

--David J. Dawson

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REVIEWS

THE CRUSADING RELATIVIST

The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions. Selected and Edited with Introduction and Commentary by Max Lerner. New York: The Modern Library, 1943, Rev. 1953.

One cannot get far in an exploration of contemporary American legal thought without discovering the giant shadow of Oliver Wendell Holmes (1841-1935). The extent of his legacy is evidenced by the variety of legal groups who, while strongly disputing one another's views, admire Holmes or claim him as their predecessor. Among his most fervent champions are the modern legal "Realists" who hold among other things that law exists only as a series of isolated particular judgments and that precedents function only as "rationalizations" of judicial opinions. Yet, as Max Lerner, the contemporary liberal historian, tells us, "The traditionalists have been unwilling to fight him openly, for there was a deep strain of traditionalism in him." (p. 367) And even "those who have attacked every school of law and even the law itself have either exempted Holmes or sought to enroll him on their side." (p. 368)

On the political side, he has been attacked and praised by liberals and conservatives alike for specific judicial decisions. But Holmes himself was neither a conscious liberal nor a conscious conservative in any kind of active sense. Lerner tells us that he "refused to read the newspapers and identified himself with none of the political or economic movements of his time...." (p. xviii) Although he had devoured law books as a young man, while a Supreme Court Justice "He read a considerable body of literature, rarely in law or public affairs, but mainly in philosophy, social theory, or fiction." (p. 130)

The primary focus of Holmes's interest and of his political-legal influence has not been practical but theoretical. Lerner tells us that "during the last quarter-century of his life he emerged as easily the most important legal philosopher of America." (p. 367) Even as a justice, when of course his specific opinions had a more direct political effect, it was his approach to constitutional law, his views about the judicial function which had the most lasting impact. "More than anyone before him in the history of the Supreme Court, Holmes brought to his task a large philosophic view...." (p. 129)

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What was this philosophical view?

This book provides a key to his philosophy, unsystematic though it was, through selected judicial opinions, personal letters, articles and speeches, and excerpts from his only book, The Common Law, of which, Lerner states, "Even if he had never written anything else, it would have given him a high rank among Anglo-American legal historians and theorists." (p. 44) In his commentary, Mr. Lerner includes a personal history, has tied Holmes's ideas to the events of his life, and has shown some of the connections between the ideas themselves. Mr. Lerner tells us in his foreword that in his selection he has asked himself "what in Holmes would interest a layman who cares in a serious way about ideas." (p.vii)

The importance of ideas to Holmes is illustrated by the major influences in his life. Raised in Boston, then the intellectual and commercial hub of the Western Hemisphere, Holmes attended Harvard College during the late 1850's where debates over the philosophical implications of the scientific discoveries of Darwin were thick in the air. Just before his graduation in 1861, the Civil War broke out and Holmes enlisted with the Union. After nearly three years of fighting, interrupted only to recover from his injuries, he returned to Boston and at age 23 entered Harvard Law School. It was during his years at Harvard that he took a course in logic from Charles Peirce (later called the father of pragmatism) and made the acquaintance of other young pragmatists like William James and Chauncey Wright who were part of an informal "metaphysical club" with which he met to discuss philosophical issues. Upon graduation, Holmes made a trip to Europe where he met the English utilitarian philosopher John Stuart Mill (famed for his "greatest good for the greater number" principle). Admitted to the Bar in 1867, Holmes began his legal career as an apprentice in a law firm.

Before Holmes was thirty, he had begun lecturing on constitutional law at Harvard and had become an active editor of the American Law Review. His editorship gave him the opportunity to read widely in American, English, and Continental legal literature, and in 1873 he edited the twelfth edition of Kent's Commentaries on American Law. In 1881, he published a series of lectures (The Common Law) which helped lead to a professorship at Harvard Law School. He taught only a term, however, before he accepted an appointment in 1882 to the Massachusetts Supreme Court where he served until 1902. Following this, he was appointed to the United States Supreme Court where he served until his retirement in 1932.

In order to understand Holmes's legal philosophy, it must be recognized that

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he is part of the American pragmatic philosophical tradition. The tenet fundamental to pragmatism is a strong anti-absolutism: the conviction that all principles are to be regarded as working hypotheses rather than as metaphysically binding axioms. That Holmes shared this conviction is evidenced by his description of himself as a "bet-abilitarian." He felt that one could place strong odds (or a high probability) on the universe acting in a predictable, orderly manner.

Accompanying this notion is the pragmatic rejection of causal necessity, which means a breakdown in the cause-effect connection with emphasis on observable actions and consequences--on effect rather than cause. As Holmes put it in a 1918 Harvard Law Review article, "we do not know what we are talking about when we speak of brute matter. We do know that a certain complex of energies can wag its tail and another can make syllogisms." (p. 398)

Following from the pragmatic rejection of absolutes is an evolutionary relativism which holds that what is true for one time or place may not be true for another--that reality as well as man's knowledge of it is constantly evolving. In Holmes, this relativism has strong Darwinian overtones. In a 1911 speech, he said, "our only but wholly adequate significance is as parts of the unimaginable whole....even while we think that we are egotists we are living to ends outside ourselves." (p. 27) This "whole" was seen by Holmes as the culmination, in continuous gradual progress, of the inevitable conflict of man's interests in his constant struggle for survival. This Darwinian notion is further borne out by his view expressed in an 1895 speech that "combat and pain still are the portion of man....the struggle for life is the order of the world, at which it is vain to repine." (p. 19)

A major pragmatic criterion for both truth and meaning is agreement on the part of the community or the majority. Most pragmatists attempt to modify this wholesale collectivism by adding that the majority in question is the majority of reasonable men who have "adequately investigated" the issue in question. Holmes defines truth as that which "I can't help believing." How does this fit the collective criterion? As Holmes put it in a Harvard Law Review article on "Natural Law": "our test of truth is a reference to either a present or an imagined future majority in favor of our view....what gives it objectivity is the fact that I find my fellow man to a greater or lesser degree (never wholly) subject to the same Can't Helps." (p. 395)

Politically, pragmatists usually advocate Democracy as the system best suited to change with the needs of the majority. And since, in their view, truth tends

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to be that which gets accepted in the free competition of ideas, pragmatists hold tenaciously to free speech--almost as if it were an absolute. Holmes was an eloquent spokesman for the "free market of ideas" and defended this right in the flood of cases arising in the wake of World War I.

A final element found in pragmatism is an optimism based on a belief in the constant progress of civilization. One finds in Holmes's personal character a profound this-worldly optimism, counterbalancing and contradicting his view of the inevitable clash and pain of men. And, in contrast to his emphasis on the collective, one sees a strong individualism, unafraid of what he called the "hydraulic pressures" of public-interest groups. This attitude was frequently expressed by Holmes in such remarks as: "the chief worth of civilization is just that it makes the means of living more complex....more complex and intense intellectual efforts mean a fuller and richer life. They mean more life. Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it." (Bar Association Speech, in 1900, p. 42-42)

It was Holmes who translated the principles of pragmatism into the field of law.

When Holmes made his oft-quoted statement (in The Common Law) that "The life of the law has not been logic, it has been experience" (p. 51) he was not advocating the abandonment of logic but emphasizing that logic was only a part of experience. As such, the settlement of legal questions involved, for Holmes, more than logic; it involved factors "not capable of exact quantative measurement...." (Harvard Law Review, "The Path of the Law," in 1897, p. 80) Therefore, in any given legal system, "the means do not exist for determinations that shall be good for all time...." (p. 80) A legal decision "can do no more than embody the preference of a given body in a given time and place." (p. 80)

What Holmes rejected was the universality and exactitude of deductive logic, but this did not mean that he failed to apply general principles to concrete situations. Indeed, part of his reputation lay in his famous ability to pierce rapidly through myriad details of a case and see the central issue. This inconsistent attitude is remarked upon by Holmes in a 1919 personal letter, "I always say the chief end of man is to form general propositions--adding that no general proposition is worth a damn." (p. 444) For Holmes, then, it was the concretes of the case, and not principle, which determined legal decisions. "General propositions do not decide concrete cases." (Lochner v. New York, in 1905, p. 149)

Holmes's strong distrust of absolutism along with his emphasis on observable

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effects rather than cause is reflected in legal theory by this "rule-skepticism" embodied in his famous predictive theory of law which involves a re-definition of legal rules as predictive hypotheses of the court's action. He enunciated this in an 1897 Harvard Law Review article saying, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law." (p. 75) For the citizen, especially the "bad man," a law means "a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money." (p. 75) Holmes held that the lawyer must see law from the same point of view. To have a clear idea of law, the lawyer must view it first as a system of punishments, rather than as a system of principles, and consider all else secondary. This especially relegates to second place moral justifications for law, such as Locke's natural law doctrine or Kantian pre-existing duties whose confusion with, and admixture into, law Holmes considered among the chief fallacies of traditional legal theories. In keeping with this point of view, he defined a right for legal purposes as "only the hypostasis of a prophecy--the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it." (quoted by Lerner, p. 373) [Italics mine.]

Thus, for Holmes, the justification or criterion for a legal action doesn't and shouldn't rest in the morality of the act concerned. Law, in order to be predictable, must be objective and scientific, and Holmes saw ethics as essentially subjective, as "a body of imperfect social generalizations expressed in terms of emotion." (p. 372) Law is separate from morality, in that a legal prohibition doesn't tell what is good or bad, but only that if one does certain things "they will put the screws" to the wrongdoer. (Harvard Law Review, "Natural Law," in 1918, p. 396)

All this is not to say, in Holmes's view, that ethics are unrelated to law; only that the relation is one where law can neither be blamed nor praised in a moral sense. "The law is the witness and external deposit of our moral life." (Harvard Law Review, "Path of the Law," in 1897, p. 73) Thus, a law is only "good" or "bad" in the sense that it is the result, or reflection, of the good or bad morality predominant in the community which brings it about. Holmes observed that he had "no belief in panaceas and almost none in sudden ruin. I believe with Montesquieu that if the chance of a battle--I may add, the passage of a law--has ruined a state, there was a general cause at work that made the state ready to perish by a single battle or law." (1913 Speech, p. 390) The general cause implied here is public opinion, and Holmes considered public opinion open to change through education and persuasion.

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If the criteria for judicial decision are not deduced from logical or moral principles, what is the basis of prediction to be? By what standard is the decision made? Holmes, emphasized that the decision will be the "unconscious result of instinctive preferences and inarticulate convictions" (The Common Law, p. 54), or "a judgment or intuition more subtle than any articulate major premise" (Lochner v. New York, in 1905, p. 149) and rest upon "the prejudices which judges share with their fellow-men." (The Common Law, p. 52) This did not mean to Holmes that judicial decisions were inevitably subjective and arbitrary, but that recognition of personal subjective factors could help minimize arbitrary personal bias by recognizing its source. He claimed that all these "intuitional" factors were traceable to public policy. Thus, it is consideration of "what is expedient for the community concerned" (The Common Law, p. 54) which acts as what Holmes called the amoral external standard which is his justification for all law. This standard breaks down legal distinction between statutes with similar observable effects but differing moral values attached. For example, liability under acts authorizing eminent domain and liability for "wrongful conversion of property" involve the same legal consequences. "In both cases the party taking another man's property has to pay its fair value as assessed by a jury, and no more." (Harvard Law Review, "Path of the Law," in 1897, p. 75)

The amoral external standard reflects Holmes's fundamental Darwinian and Utilitarian concepts of man's relation to his universe. That social advantage sometimes requires individual sacrifice; that society demands the subordination of one group to another was seen by Holmes as part of the inevitable conflict inherent in life and reflected in law.

The extent of this attitude is revealed in the following remarks made by Holmes in an 1873 American Law Review article: "All that can be expected...is that legislation should...modify itself in accordance with the will of the de facto supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum....But it is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that; and none the less when the bona fide object is the greatest good of the greatest number." (p. 50-51)

Thus Holmes asks: "Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition." (Harvard Law Review, "Path of the Law," in 1897, p. 80) It is not because he has an intrinsic right to use his property as he sees fit. If the latter were so, he would retain this liberty (whether

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recognized or not) under all conditions--but for Holmes, there are no principles which hold for all conditions. Holmes saw even the Bill of Rights as embodying protection for individual rights only in a qualified sense. Even the fundamental right to life is subject to public demands--for in time of war, "we march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it." (1926 personal letter, p. 431)

One important aspect of Holmes's legal theory was his approach to the Constitution. He did not see the role of the Supreme Court as concerned with social policy directly. "The criterion of constitutionality is not whether we believe the law to be for the public good." (Adkins v. Children's Hospital, in 1923, p. 178) Thus, Holmes draws a distinction between the functions of those judges who judge men, and those judges who judge the law. He saw the judicial role as one of restraint and broad toleration toward laws enacted by the democratic process. In Mr. Lerner's words, "Only where the State act was 'manifestly absurd' did it, in his view, come within judicial control." (p. 128) Lerner characterizes this policy as "judicial laissez-faire." (p. 127)

Thus, in effect, his emphasis in constitutional interpretation was not on whether the Constitution permits a given government action but whether there is anything in the Constitution to prevent it. In the name of this policy, he upheld the right of states to pass minimum wage laws, to regulate working hours, to regulate banking, to forbid corporations to acquire drugstores, and to sterilize the feeble-minded. On the other hand, he found both the making of skin color "the basis of a statutory classification" (Nixon v. Herndon, in 1927, p. 332), and the fining of a newspaper editor who criticized a judge "manifestly absurd."

Lerner sees this judicial approach as reflecting Holmes's Darwinian notion that it is futile to intervene with "natural social forces." It might also be seen as a result of his relativism. The following quote from one of his most famous dissents (Lochner v. New York) might be held to reflect both philosophical strains: "I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law....a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire." (p.148-49)

While Lerner notes that this approach to the Constitution differs from what was prevalent at the time, he seems to accept Holmes's approach as an admirable innovation, on the grounds that those Justices who differed with Holmes were

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reading their own views into the Constitution. Whether or not this be the case, it seems surprising to me that Lerner doesn't mention one obvious criticism of this Constitutional interpretation. In criminal law (as Holmes points out in his Northern Securities dissent, p. 217), it is the Anglo-American tradition always to construe any ambiguity in the law in favor of the defendant and against the state, i.e., the law-maker. This is derived from the position that a citizen has complete freedom except where the law clearly and explicitly forbids an action. According to the material presented in this book, what Holmes seems to have done is to transfer this principle to constitutional law, i.e., any ambiguity in the Constitution is construed in favor of the law being questioned, as if it were a defendant. But insistence on individual freedom requires the limiting of governmental action. Laissez-faire is a policy toward men, not toward the government's power to construct "a system of punishments" for them. It is citizens to whom all that is not listed is permissible; it is governments to whom all that is not listed should be prohibited. I am not a legal expert, but in view of the Ninth Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"), Holmes's constitutional approach seems highly questionable. It seems clear to this reader that the Constitution was intended to be an enumeration of powers which were granted by the people to their government, and that all other rights were retained by them.

Holmes's legal philosophy was influential, at least in part, because of its relation to a more general philosophical approach. As pragmatism, through the influence of William James and John Dewey, gained a new generation of adherents, they came upon the words of Holmes with a sense of recognition. But their admiration was for form as well as content, as Holmes was a superb legal craftsman. He was also a stylist of distinction. Consider the following excerpts from his writings:

> "It is one thing to utter a happy phrase from a protected cloister; another to think under fire--to think for action upon which great interests depend."
>
> "For my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."--on wiretapping.
>
> "Three generations of imbeciles are enough."--on sterization of the feeble-minded.

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"...if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us, but freedom for the thought that we hate."--on free speech.

"The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues."--on freedom of the mails.

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."--majority opinion upholding the conviction of the author of a wartime pamphlet against the draft (Schenk v. U.S.).

"...a man may live greatly in the law as well as elsewhere;... there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable."--on law and life.

The ideology of Holmes demonstrates both the power of ideas and the nature of their influence. I have enumerated the tenets of pragmatism which had such an effect on him because they offered a seemingly scientific philosophy, an optimistic outlook, an attempt to unite theory and practice, and stressed the value of intellectual freedom. What alternative views had he rejected? The doctrine of absolute rights was generally derived either from theology or from the moral philosophies of Kant and Hegel. A bright young man who was enamored of the advance of science and who was looking for a rationally grounded political theory might well accept the false alternative that rights must be justified either by absolutism not based on reason or by public expediency.

More than this, Holmes could see that even those who enunciated the principle of rights conceded that rights must be qualified or limited in some ways. He answered those who opposed legislation on the ground that it violated rights in this way:

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> "The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every State or municipal institution which takes his money for purposes throught desirable, whether he likes it or not." (Lochner v. New York, in 1905, p.149)

The standard used almost exclusively today to judge political action is "the public good." Holmes was an important part of the trend to undercut inalienable rights as the defense for the Bill of Rights and replace it with the public-good criterion. The consequence of this criterion has been a corresponding change in the concept of the Republic, and an accelerated expansion of government power into new areas. (Mr. Lerner points out that Holmes's influence did not affect large areas of criminal and civil law--private law--but was chiefly operative in the field of so-called "public law.")

Why has Holmes's influence been so extensive? Reading this book provides us with a clue. Consider the drive to use one's powers to the fullest and the profound love of life projected by Holmes's personal character. Consider his articulate and eloquent use of language. When a man fights for relativistic and collectivist values in the manner of a moral crusader, it is not accidental that such ideas are invested with a significance and impact far beyond what they could ordinarily command.

--Judith Kroeger

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